

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Silver Creek Industries, LLC

Case No: 22-0353-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor, Silver Creek Industries, LLC (Silver Creek), submitted a request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on September 14, 2022, with respect to work performed by Silver Creek on the Monroe Modular TK-5 Project (Project), for the Inglewood Unified School District (Awarding Body), in the County of Los Angeles. The Assessment determined that \$5,494.91 was due in unpaid prevailing wages, and \$15,520 was due in statutory penalties.

Hearing Officer Michael R. Drayton held a Hearing on the Merits on August 29, 2023. Evan Adams appeared as counsel for DLSE. There was no appearance by Silver Creek. Deputy Labor Commissioner Alfredo Roman testified in support of the Assessment. The Hearing Officer submitted the matter for decision on August 29, 2023.

At the hearing, DLSE made an oral motion pursuant to Rule 26, subdivision (a) [Cal. Code Regs., tit. 8, § 17226, subd. (a)],¹ to amend the Assessment downward to reflect removal of \$12,000 in penalties assessed under Labor Code section 1776.² The amendment did not prejudice Silver Creek, thus, the Hearing Officer granted the motion. (Rule 26, subd. (b).)

¹ Individual sections of the Prevailing Wage Hearing Regulations, California Code of Regulations, title 8, section 17201 et seq., are referred to as "Rules" using their last two digits only. (Rule 01, subd. (d).)

² All further section references are to the California Labor Code.

The issues for Decision are as follows:

1. Whether the Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. Whether DLSE served the Assessment timely.
3. Whether Silver Creek requested review timely.
4. Whether DLSE made its enforcement file available timely.
5. Whether DLSE used the correct prevailing wage classifications in the audit.
6. Whether DLSE used the correct prevailing wage determinations in the audit.
7. Whether the hours worked as listed in the audit were correct.
8. Whether DLSE used the correct mathematical calculations in the Assessment.
9. Whether Silver Creek listed the wages paid to the workers correctly in the Certified Payroll Records (CPRs).
10. Whether Silver Creek listed all hours worked in the CPRs.
11. Whether Silver Creek is liable for penalties under section 1775.
12. Whether Silver Creek is liable for liquidated damages under section 1742.1.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, as amended. (Rule 50, subd. (a).) The evidence stood un rebutted, as no representative appeared for Silver Creek. Thus, Silver Creek failed to carry its burden to prove the bases for the Assessment were incorrect. (Rule 50, subd. (b).) Accordingly, the Director issues this Decision affirming the Assessment, as amended.

FACTS

Failure to Appear.

Silver Creek filed its Request for Review timely. After doing so, Silver Creek failed to appear for the noticed prehearing conference and for the Hearing on the Merits.

On February 22, 2023, the Hearing Officer's assistant served Silver Creek with

written notice of a Prehearing Conference set for April 28, 2023, at 2:00 p.m. On the morning of April 27, 2023, DLSE's counsel requested a continuance of the Prehearing Conference by email copying Silver Creek. On the afternoon of April 27, 2023, DLSE's counsel indicated that he had spoken to Silver Creek's CEO, Jim McGeever, settlement negotiations were ongoing, and reiterated the request for a continuance, specified 30 days, and indicated McGeever did not oppose the request for a continuance. The Hearing Officer granted the request for a continuance. On April 28, 2023, the Hearing Officer's assistant served the parties with a written notice continuing the prehearing conference to June 2, 2023, at 1:00 p.m. On June 2, 2023, Silver Creek failed to appear at the conference. Thereafter, on June 26, 2023, the Hearing Officer's assistant served Silver Creek with written notice scheduling a Hearing on the Merits for August 29, 2023 at 10:00 a.m. All the written notices were served by first class mail to the address on record, Silver Creek Industries, LLC, 2830 Barrett Avenue, Perris, CA 92571. Copies were also sent by email to Kendall Gomez at the address on record. On August 16, 2023, DLSE served Silver Creek with the DLSE statement of issues, a list of witnesses, a list of exhibits, and Exhibits 1 through 4 before the Hearing on the Merits.

On August 29, 2023, at 9:45 a.m., Jim McGeever of Silver Creek sent an email to the Hearing Officer informing the Hearing Officer as follows: "The company has filed chapter 11 and is in the process of submitting its chapter 7 plan to completely dissolve the company. No one from Silver Creek (there are no remaining employees) will be attending the hearing today."³ No representative of Silver Creek appeared at the Hearing on the Merits. The Hearing Officer proceeded to conduct the Hearing as noticed

³ The Director takes official notice that on April 25, 2023, Silver Creek Industries LLC filed for chapter 11 protection in the Central District of California (Case No. 23-11677), *after* the Assessment issued. There is no automatic stay in bankruptcy proceedings where a government entity, such as DLSE, seeks to enforce its police or regulatory power, in this case the California prevailing wage law. (11 U.S.C § 362(b)(4).)

and scheduled in order to formulate a recommended decision as warranted by the evidence. (Rule 46, subd. (a) [“Upon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer may proceed in that Party’s absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party”].) The Hearing Officer admitted into evidence without objection DLSE Exhibit Numbers 1 through 4.⁴ Roman testified for DLSE about his investigation of the matter. Roman’s testimony included discussion of the business records within the DLSE files, Silver Creek’s Certified Payroll Records (CPRs), applicability of Prevailing Wage Determinations, and the Penalty Review he prepared.

The Project.

The Project entailed the construction of modular classroom buildings. The Awarding Body registered the Project with the Department of Industrial Relations using the electronic form PWC-100 in accordance with section 1773.3 and California Code of Regulations, title 8, section 16451. (DLSE Exhibit No. 3.) On the PWC-100, the Awarding Body listed September 12, 2018 as the first advertised date. (*Ibid.*) The Awarding Body accepted Silver Creek’s proposal for the Project on September 20, 2018. (DLSE Exhibit No. 1, Penalty Review, p. 11.) The recorded date of notice of completion was February 2, 2021. (DLSE Exhibit No. 1, Penalty Review, p. 4.)

The Assessment.

The documentary evidence and testimony of Roman established that DLSE opened an investigation into the Project based on a complaint filed on January 19, 2021 by Ana Ramirez of the Labor Management Compliance Council. The complaint alleged that Silver Creek misclassified workers on the Project and underpaid workers in various

⁴ DLSE submitted as part of the exhibit package the declaration of Roman, dated August 16, 2023, with Exhibits A and B attached thereto. Exhibit A was the Penalty Review and Exhibit B was the Assessment.

trades on the Project. (DLSE Exhibit No. 1, Penalty Review, pp. 14-15.) Roman reviewed the CPRs provided by Silver Creek by email on June 24, 2021. (DLSE Exhibit No. 4.) He determined that Silver Creek erroneously classified three workers as Laborer Apprentices when there were no journeyman Laborers on the project. Consequently, he reclassified the three workers as Housemovers. He determined that the remainder of Silver Creek's employees were correctly classified on the CPRs, but were underpaid.

Using the crafts listed in Silver Creek's CPRs, Roman calculated what the workers should have been paid utilizing the following prevailing wage determinations in effect in September 2018: Housemover (SC-102-507-1-2018-1); Carpenter (SC-23-31-2-2018-1); Ironworker: Area 2 (C20-X-1-2018-2); Inside Wireman (LOS-2018-2); and, Plumber (LOS-2018-2). As indicated above, since there were no journeymen Laborers on the Project, Roman reclassified those workers listed as Laborer Apprentices as Housemovers, in light of the scope of work performed. In comparing the hours of work and rates of pay as reported on the CPRs supplied by Silver Creek to the PWDs applicable to the classifications utilized, Roman found that while Silver Creek otherwise classified the workers appropriately, they were underpaid.

With respect to the penalty, Silver Creek had a prior history of a violation, and DLSE had assessed penalties under section 1775. (DLSE Exhibit No. 1, Penalty Review, p. 16.) Therefore, the penalty rate of \$80 per violation for under payment of wages was appropriate.

Roman issued the Assessment on September 14, 2022. (DLSE Exhibit No. 1, Declaration of Roman, August 16, 2023, p. 2, ¶ 7, and Exhibit B attached thereto.) This was more than 18 months after the Awarding Body filed the Notice of Completion, February 2, 2021. According to Roman, the Awarding Body delayed providing DLSE with the Notice of Completion from June 26, 2021, until November 30, 2021, a total of 158 days. The delay extended the time within which to serve the Assessment until January 7, 2023. (DLSE Exhibit No. 1, Penalty Review, pp. 17-26.) Thus, service of the Assessment on September 14, 2022 was timely.

Silver Creek filed a request for review on October 18, 2022. DLSE provided Silver Creek with the form Notice of Opportunity to Review Evidence Pursuant to Labor Code section 1742, subdivision (b) on November 10, 2022.⁵

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL was summarized by the California Supreme Court as follows:

The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, citations omitted (*Lusardi*)). DLSE enforces prevailing wage requirements not only for the benefit of workers but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a) and see *Lusardi*, at p. 985.)

The prevailing rate of pay for a given craft, classification, or type of worker is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines the rate for each locality in which public

⁵ DLSE transmitted both the Request for Review and the Notice of Opportunity to Review Evidence to the Director pursuant to Rule 23, and the documents are part of the Director’s file in this matter. The Director takes official notice of the Notice of Opportunity to Review Evidence and the proof of service accompanying it pursuant to Rule 45.

work is performed (as defined in section 1724) and publishes a general Prevailing Wage Determination (PWD) for a craft, to inform all interested parties and the public of the applicable prevailing wage rates. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate, and prescribes penalties for failing to pay the prevailing rate. Section 1775, subdivision (a) (2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

When DLSE determines that a violation of the prevailing wage laws has occurred, DLSE issues a written civil wage and penalty assessment pursuant to section 1741. The assessment must be served within 18 months of the filing of a valid notice of completion. An affected contractor may appeal the assessment by filing a request for review under section 1742. DLSE transmits the request for review to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment” (Rule 50, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (Rule 50, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

In this matter, the record as a whole provides prima facie support for the Assessment. Based on the evidence it collected, DLSE determined that Silver Creek misclassified several workers and underpaid prevailing wages in the amounts calculated. (Rule 50, subd. (a).)

Silver Creek Failed to Pay the Required Prevailing Wage Rates, and DLSE Assessed Penalties Properly.

In this case, the record establishes the basis for the Assessment. The Awarding Body filed a Notice of Completion on February 2, 2021. Therefore, the 18-month limitations period for service of the Assessment would have expired on August 2, 2022. However, the record reflects that DLSE requested a notice of completion from the Awarding Body on June 16, 2021, but that the Awarding Body did not provide the notice to DLSE until November 30, 2021, 158 days late. Therefore, the time for service of the Assessment was tolled during this period of delay. (§ 1741.1, subd. (b).) DLSE presented evidence that it served the Assessment on September 14, 2022, just 43 days from August 2, 2022, well within the 158-day period of extension of time to serve the Assessment. Thus, the Assessment was timely.

Silver Creek filed a request for review timely. Further, DLSE provided Silver Creek with an opportunity to review the evidence to be used at the hearing. DLSE presented evidence that Silver Creek underpaid prevailing wages to its employees. DLSE used five PWDs in effect in September 2018, at the time the Awarding Body advertised the Project and accepted Silver Creek's proposal. Silver Creek had a history of a prior public works prevailing wage violation.

Section 1775, subdivision (a), states in relevant part:

- (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
- (2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

- (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
 - (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
- (B) (i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the contractor . . . to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor . . .
- (ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor . . . has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
 - (iii) The penalty may not be less than one hundred twenty dollars (\$120)... if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.

. . .

- (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused

his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Rule 50, subd. (c).)

DLSE assessed section 1775 penalties at the mitigated rate of \$80. Silver Creek violated the prevailing wage laws previously, and had been assessed 1775 penalties before. The burden was on Silver Creek to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at \$80. Silver Creek did not appear and provided no evidence of abuse of discretion by DLSE in its selection of the penalty rate. Therefore, the rate of \$80 per violation is affirmed.

Silver Creek Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, as follows:

After 60 days following the service of a civil wage and penalty assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment . . . is subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid . . .

The statutory scheme regarding liquidated damages provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposited with the Department of Industrial Relations the full amount of the assessment of unpaid wages, including all statutory penalties.

Silver Creek did not pay the workers the wages assessed or make a deposit with the Department of Industrial Relations pursuant to Labor Code section 1742.1. Thus, Silver Creek is liable for liquidated damages in the amount of \$5,494.91.

Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.

2. DLSE served the Civil Wage and Penalty Assessment timely in accordance with section 1741.

3. Affected contractor Silver Creek Construction, Inc., filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

4. DLSE timely provided Silver Creek Construction, Inc. timely with the evidence to be used at the Hearing on the Merits.

5. The workers listed in the audit performed work in Los Angeles County during the pendency of the Project and were entitled to be paid the journeyman rate for that work in their respective crafts.

6. Silver Creek Construction, Inc. underpaid prevailing wages to his employees on the Project.

7. DLSE did not abuse its discretion in setting section 1775 penalties at the rate of \$80 per violation, and the resulting total penalty of \$13,520.00 for 169 violations, is affirmed.

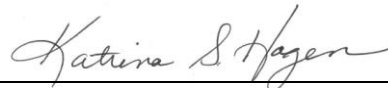
8. Silver Creek Construction, Inc. is liable for liquidated damages in the amount of \$5,494.91.

The amounts found due in the Assessment, as affirmed by this Decision, are as follows:

Basis of the Assessment	Amount
Unpaid Prevailing Wages	\$5,494.91
Penalties under section 1775:	\$13,520.00
Liquidated damages under section 1742.1	\$5,494.91
TOTAL:	\$24,509.82

The Civil Wage and Penalty Assessment, as amended, is affirmed as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 8/14/2024



Katrina S. Hagen, Director
California Department of Industrial Relations